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In The

Supreme Court of the United States

October Term, 1939.

No. 570.

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN C. SHAW, Administrator De Bonis Non of the Estate of Sydney C. McLouth, Deceased,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.[1]

OPINION BELOW.

The opinion of the Supreme Court of Michigan is officially reported in *Volume 290 of Michigan Reports, at page 311.*

1. Excepting where the context clearly indicates otherwise, all italics herein are those of undersigned counsel.

JURISDICTION.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code on allegation that the decision below denied an immunity claimed by petitioner under the Constitution and Statutes of the United States.

QUESTION PRESENTED.

It is respectfully suggested that petitioner's statement of presented question is inaccurate and that the true question is:

Where the United States voluntarily presents and prosecutes, to final judicial determination in a state Probate Court, a meritorious claim against an estate which originally accrued to the Emergency Fleet Corporation and passed to the United States by assignment, and where a set-off against such claim consisting of a counter cause of action against the Fleet Corporation is duly asserted and ultimately upheld on the merits by a final judgment of the highest court of such state, does such Probate Court, considering the *pendente lite* assumption by the United States of the Fleet Corporation's obligations by the Act of June 29, 1936, possess jurisdiction on remand to enter an order in accordance with the local statutory practice by which the excess of the adjudicated set-off over and above the claim as presented is "ascertained and allowed"?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case omits the following material facts:

The merits of the instant set-off were adjudicated and placed at rest by judgment of the Michigan Supreme Court on *former appeal (In re McLouth's Estate, 281 Mich. 191)*. That decision was rendered in 1937, and no review was ever sought in the present court.

So that this court may readily comprehend the various proceedings which were taken in the Michigan courts and the consequent finality of such judgment, we respectfully submit the following outline taken chronologically from the reported cases:

In May of 1920 U. S. Shipping Board Emergency Fleet Corporation, designated in the contract as "acting for and on behalf of the United States," undertook with McLouth to assume and pay his certain debt to Ingram-Day Lumber Company. See both opinions of Michigan Supreme Court—*281 Mich. 191; 290 Mich. 311.* The debt not being paid, Ingram-Day Lumber Company sued McLouth. The Fleet Corporation and its own staff of attorneys took complete charge of McLouth's defense, but were unsuccessful, and judgment against McLouth's administrator in the sum of $42,789.96 was ultimately recovered. *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471.)* This judgment was thereafter duly allowed (by the Michigan Probate Court holding jurisdiction over McLouth's estate) as a proper claim of Ingram-Day Lumber Company against McLouth's Es-

tate in the sum of $58,089.04, including interest and costs (R. 14, 15).

Supplemental contractual dealings between McLouth and the Fleet Corporation, concerning the same general matters, resulted in accrual to the Fleet Corporation of a cause of action against McLouth. The cause of action passed to the United States by the assignment of 1923 *(United States ex rel. Skinner and Eddy v. McCarl, 275 U. S. 1; In re McLouth's Estate, 281 Mich. at page 196)* and, in 1933, the United States recovered judgment thereon against McLouth's administrator in the sum of $40,165.40 (Affirmed on appeal—*Shaw v. United States, 75 Fed. (2) 175).* This judgment was also made the basis of a claim which was duly presented by the Government against McLouth's estate with statutory petition to such probate court for allowance thereof.[1] In accordance with local statutory practice the administrator exhibited and proved, in offset, the Ingram-Day claim and the Fleet Corporation's covenant to assume and pay same. On first hearing the Probate Court (acting by local statute as Commissioner on Claims) allowed the Government's claim and disallowed the set-off. On appeal to the Circuit Court of Michigan (an appellate court in probate cases),[2]

1. The judgment obtained by the Government in federal court against McLouth's administrator was not received as conclusive evidence of the Government's claim against the estate. Because the Government, in prosecuting the suit in federal court, failed to observe the local practice respecting notice to creditors of an insolvent estate, the federal court judgment was held by the circuit court on former appeal as having no probative force as against the appellant creditors. See appendix for complete copy of circuit court opinion on such former appeal. Government counsel finally conceded that the judgment was not conclusive as against such creditors. See recorded concession in *281 Mich. 199.*

2. See collection of cases in opinion of Michigan Supreme Court (R. 74).

the Probate Court's order was reversed and the set-off was upheld. On appeal to the Supreme Court of Michigan, the Circuit Court's judgment was affirmed *(281 Mich. 191)* and the case was remanded to the Probate Court with instructions.

One question only was left open for decision by the Probate Court on such remand (R. 14, 43). That question was: should statutory "ascertainment and allowance" be made of the excess of the adjudicated set-off over the claim as presented? (R. 42). Such question was resolved in favor of the estate by order of the Probate Court "ascertaining and allowing" the excess owing by the United States at the sum of $23,628.97 (R. 16), and the order was duly affirmed on appeal by the Supreme Court of Michigan. The latter court's judgment of affirmance is the decision which this court, on the instant application for writ of certiorari, has consented to review (Cert. Gr. Jan. 8, 1940).

SUMMARY OF ARGUMENT.[2]

POINT A.

The Probate Court's order is a judicial ascertainment or determination of amount owing by the United States and does not constitute a money judgment against the United States.

POINT B.

The Probate Court's order, whether it be termed a judgment or judicial determination of amount, is eminently proper under the decisions of this court.

POINT C.

Immunity from affirmative judgment or judicial ascertainment in this case, if any, was waived when the United States, having already taken a general assignment of assets and receivables from the Fleet Corporation, dissolved the latter and assumed its obligations by the Act of June 29, 1936.

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2. Since this brief will have been prepared before service of printed copies of the petitioner's brief, all pertinent references herein are to the typewritten advance copy of petitioner's brief forwarded us by the Solicitor General on January 19, 1940. It is assumed that page numbers of the printed copy will conform to the typewritten copy.

ARGUMENT.

POINT A.

The Probate Court's order is a judicial acertainment or determination of amount owing by the United States and does not constitute a money judgment against the United States.

The Solicitor General alleges that the Michigan Supreme Court has decided the question to be reviewed in a way not in accord with *United States v. Eckford, 6 Wall. (73 U. S.) 487.* Preliminarily, therefore, we take the following excerpt from the *Eckford case:*

> "Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States,* decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the Acts of Congress have authorized him to do, no *judgment* can be rendered against the Government, *although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount.*"

The Solicitor General offers no argument to the point that a money judgment, as distinguished from a judicial determination or ascertainment of amount owing, was entered by the Probate Judge and approved by the Michigan Supreme Court. Indeed, he apparently concedes that the Probate Judge's order is not a money judgment because, in brief on the merits, he repeatedly declares that it makes no difference whether the order of the Probate Court be denominated a "judgment" or a "judicial ascertainment" in view of the fact that it "con-

stitutes a *final determination* of the liability of the United States" (Br. pp. 5, 8, 12).

If, by such argument, the Solicitor General intends to concede that the Probate Court's order is not a money judgment as distinguished from a final ascertainment or determination of amount owing by the United States, then the present issue is greatly simplified. We are certainly ready to concede that the order "constitutes a final (though legally unenforcible) determination of the liability of the United States." The respondent has never claimed otherwise and the efforts of his counsel have been continuously devoted to the proposition that the Probate Judge, in making a final judicial ascertainment or determination of the balance owing by the United States, did not and could not enter a money judgment.

It is submitted that the position of Government counsel in this regard is most incongruous and contradictory. They apparently lean heavily on the *Eckford case* and yet attempt to reject its plainly declared approval of jurisdiction, in a *judicial* proceeding voluntarily instituted by the Government, to make final *judicial* ascertainment (short of a money judgment therefor) of a balance owing by the United States. The contention overlooks this court's declaration that Governmental indebtedness may be *judicially* ascertained in such a proceeding, and it prompts the question: If the permitted "judicial ascertainment" of Governmental indebtedness in given case was not intended by this court to be a final, though unenforcible, determination of the liability of the United States, what was it intended to be? This court was certainly not dealing out bootless procedural advice and the answer, as we read the *Eckford case*, is not difficult of divination. The sovereign dignity was thereby protected from the command of the usual money judgment which is enforcible by execution, and final judicial determination of amount

owing by either party was still permitted in the interest of complete and final adjudication. See for confirmation of this view *The Gloria, 286 Fed. 188.*

As evidence that the Probate Judge did not and could not enter a money judgment as distinguished from a judicial determination of amount owing, we respectfully present the following review of the powers and jurisdiction of such Probate Court and of the Probate Judge when he acts by statute as Commissioner on Claims.

(a) The powers and jurisdiction of the Probate Court as distinguished from those of Commissioners on Claims.

The general powers and jurisdiction of the court are defined and declared by Sections 15519 and 15520 of the Michigan Compiled Laws of 1929 (Mich. Stat. Ann. 27.2619; 27.2620),[1] and we quote same in full as follows:

> "Each judge of probate shall have jurisdiction:
> 1. Of all matters relating to the settlement of the estates of all deceased persons, whether testate or intestate, who were at the time of their decease inhabitants of, or residents in his county, and of all who shall die without the state leaving any estate within such county to be administered;
> 2. Of trusts and trustees in the execution of wills and administration of estates of deceased persons;
> 3. To appoint guardians to minors and others in the cases prescribed by law, and of the settlement of the estates of such minors and others under guardianship;

1. After the instant case was decided by the Michigan Supreme Court (Sept. 5, 1939), important amendments of these sections became effective. For reasons to be presently stated, we do not believe these amendments are material here.

4. Of all cases of juvenile delinquents and dependents;

5. And shall have and exercise all such other powers and jurisdiction as are or may be conferred by law;

6. And to that end he may, upon the filing in said court of a petition therein, within ninety (90) days of the original hearing, or of the rendering or making of any order, sentence or decree, as the case may be, and after due notice to all parties interested, grant rehearings, and may modify and set aside orders, sentences and decrees rendered in such court: Provided, however, That the jurisdiction conferred by this section shall not be construed to deprive the circuit court in chancery in the proper county of concurrent jurisdiction as originally exercised over the same matter."

"Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate;

3. To keep order in his court, and to punish any

contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And shall have such other powers as may be conferred by law."

It is noted that no power to enter judgments, money or otherwise, is conferred, and that no power to issue executions is granted. We represent that the adjudicating power and jurisdiction of the Probate Court is limited to *orders, sentences and decrees;* that proceedings in such court are essentially *in rem* and are not *inter partes,* and that the powers of the court are purely statutory

In *Holbrook v. Cook, 5 Mich. 225,* it was relevantly declared:

"It is true probate courts are 'courts of record,' being declared to be such by the constitution, but they are not 'courts of law,' according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised; and then no issues are joined by pleadings, no juries are known, *and they render no judgments—their determinations being called orders, sentences or decrees*—and upon summary inquiry, with or without notice, as the case may be."

In a recent case *(In re Quinney's Estate, 287 Mich. 335)* the Michigan Supreme Court made exhaustive collection of the authorities which support our representation that, because no statute grants the power, the Probate Court is without jurisdiction to render money judgments. On the strength of eighteen cases which were cited or quoted from, the court reaffirmed the following:

"The probate court derives none of its jurisdiction

or power from the *common law, Grady v. Hughes, 64 Mich. 540,* but must find the warrant for all its doings in the statute."

In *Smith v. Shawhan, 37 Iowa 533,* the distinction between a judgment and a probate court order of allowance was clearly stated in the following language:

> *"One of the necessary incidents of every judgment is its means of enforcement by execution. An order of the county court allowing a claim against an estate and ordering the payment of such claim cannot be thus enforced. The county court has no power to issue execution upon such an order. We are of opinion that the filing and allowance of the plaintiff's claim in the county court did not constitute a 'judgment,'* in the sense in which that term is used in the clause of the statute of limitations which we have been considering, and consequently that the claim of the plaintiff is not barred as a judgment of a court not of record."

On the foregoing authorities we respectfully submit that the Probate Court could not have entered a money judgment against any party or person before it. The statutory limitation of its powers, and the very wording of the particular statute under which it assumed to act, clearly show that a judicial ascertainment of amount is all that could have been or was done. The statute in question provides:

> "When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be."

Compiled Laws Michigan, 1929, Section 15682 (Mich. Stat. Ann. 27.2829).[2]

We take note here of the Solicitor General's contention that Act 288, Mich. P. A. 1939, known as the "new Probate Code" (1939 Supp. Mich. Stat. Ann. 27.3178), which became effective twenty-one months *after* the presently criticized determination of the Probate Court was made—likewise *after* entry of the Michigan Supreme Court's judgment under review—, is authority for contention that the instant determination of amount would be enforcible by execution if the claimant had been a private one.

This new legislation, for the first time as we have seen, granted the Probate Court power "*to issue all executions* * * * which may be necessary to compel the attendance of witnesses residing in any part of the state, or to carry into effect any order, sentence, or decree of the Probate Courts, or the powers granted them by law" (Sec. 20, Chap. I). Further on in the same section, and to give procedural life to the new power, the legislature provided for the first time: "service and enforcement of the executions mentioned in this chapter and the return thereof shall be had in accordance with the law applicable in courts of record."

Aside from fundamental rule that a question of jurisdiction is determinable by the law in force at the

2. By another statute dealt with hereinafter (Compiled Laws, Michigan, 1929, Section 15681; Mich. Stat. Ann. 27.2828) the probate judge may, in his discretion, act in the place and stead of commissioners on claims. He did so throughout the proceedings which were instituted by the Government in the present case (R. 9, 15, 17).

time such jurisdiction is judicially asserted, we represent that said Act 288 declares its own inapplicability to this issue.[3] The final section of the act provides (Sec. 5, Chap. XIII):

> "This act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred *prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.*"

The fact that power to issue and levy execution was expressly granted to the Probate Court by said Act 288 is cumulative evidence, especially when such new legislation is considered with the authorities hereinbefore cited, that the power did not theretofore exist. However, and entirely aside from such consideration, we submit that the Solicitor General has lost sight of a local distinction of fundamental nature. We refer to the essential difference between the Probate Court itself and Commissioners on Claims, and we note here that the Probate Judge, throughout the proceedings under review, acted in pursuance of statute in the place and stead of Commissioners on Claims (R. 9, 15).[3]

(b) The powers and jurisdiction of Commissioners on Claims and of the Probate Judge when he acts in their place and stead.

When a Michigan Probate Judge assumes to act in accordance with statute permitting him to act as Com-

3. This fact has been admitted and declared in every pleading filed by the Government (R. 6, 7, 17, 18, 21, 22, 23, 27, 28, 29).

missioner on Claims (C. L. Mich. 1929, Sec. 15681; Mich. Stat. Ann. 27.2828), *his powers and duties are entirely distinct and separate from the general statutory powers of the probate Court and they are governed by special statutory and equitable rules.* Accordingly, even if the legislature had granted, *to the Probate Court,* general power to enter money judgments, a judicial determination by the Probate Judge, acting as Commissioner on Claims, would still not constitute a judgment or anything beyond the statutory and equitable powers of Commissioners on Claims.[4]

We pertinently quote from a recent case, *In re Brown's Estate, 280 Mich. 178,* as follows:

> "The statute, 3 Comp. Laws 1929, § 15681, provides when and how the judge of probate may sit to hear claims and says:
>
> 'The action of the judge of probate in passing upon and adjusting claims shall have the same effect upon all claims against the estate as the action of commissioners would have had if com-

4. It is of interest that Probate Commissioners on Claims have been abolished by the 1939 Michigan Probate Code (effective September 29, 1939) and the practice on submission and determination of claims and counterclaims has been radically changed (Sec. 3, Chap. VIII, Act 288, Mich. P. A. 1939; 1939 Supp. Mich. Stat. Ann. 27.3178—413). The set-off statute, in pursuance of which the instant determination of balance owing was made, now reads as follows (new wording italicized):

> "When a creditor against whom the *decedent or ward* had claims shall present a claim *against the estate, the fiduciary may file the claim of the decedent or ward* in offset *thereto* and *the court* shall ascertain and allow the balance against or in favor of the estate as *he* shall find the same to be." *(Sec. 9, Chap. VIII, Act 288, Mich. P. A. 1939; 1939 Supp. Mich. Stat. Ann. 27.3178—419.)*

missioners had been appointed and had acted according to law, and subject to the same provisions in reference to appeal.'

In *Lothrop v. Conely, 39 Mich. 757,* it was said:

"The commissioners when once appointed become a special tribunal which for most purposes is independent of the probate court, and from which an appeal lies to the circuit court."

In *Clark v. Davis, 32 Mich. 156,* the Michigan Supreme Court, speaking through Mr. Justice Cooley, said:

"The general idea of our statute,—Comp. L. 1871, Chap. 158, is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode: *Fish v. Morse, 8 Mich. 34.* Where commissioners are appointed, as was the case here, the probate court has no authority over the claims, and parties thinking themselves aggrieved appeal, not to that court, but to the circuit court. —Comp. L. § 4439."

In *Flynn v. Lorimer's Estate, 141 Mich. 710,* it was stated:

"They (the Commissioners) were acting in a judicial capacity, and their action is final when not appealed from. *Shurbun v. Hooper, 40 Mich. 503; People ex rel. Green v. McCutcheon, 46 Mich. 244; Byrne v. Hume, 86 Mich. 546; Finley v. Dubay, 112 Mich. 334.* The claim presented to them was such a claim as they were authorized to try and decide.

They did try and decide it. We think the effect of that decision is final."

In *Chapoton v. Prentis, 144 Mich. 292,* it was said:

"The allowance of the claims by the Commissioners on claims, who had jurisdiction to pass upon them, in the absence of fraud, was conclusive against the estate and all persons who had an opportunity to be heard."

The set-off statute (quoted hereinbefore, page 12), in pursuance of which the instant judicial ascertainment was made, was construed in *Willard v. Fralick, 31 Mich. 431,* as follows:

"The power of commissioners (on claims) is peculiar and very broad, and we think the language of this section should not be narrowed beyond its terms, and should allow a proper set-off in all cases."

and in *Green v. Probate Judge, 40 Mich. 246,* as follows:

"The statute evidently contemplates that in all cases where it is practicable, the representative of the estate shall exhibit such claims of set-off as exist against the demand of a creditor, so that the *final determination* shall show the balance due either party after deducting one claim from the other. Comp. L., § 4428. This is not intended to be left to the discretion of the executor or administrator; and while we are not required to determine the effect of such omission in all cases, we have no doubt the law was passed to secure this action in cases where there is no reason to the contrary. It is essential to the interests of creditors and distributees that the estate shall be closed as quickly and cheaply as possible, and that the amount of assets shall be early liqui-

dated and collected. If the estate may avoid putting in set-offs, the creditor who is at the same time a debtor may also prefer to have his own claim passed on in a suit at law, and thus greatly postpone a settlement."

In *Graham v. Graham, 171 Mich. 310,* it was said of the same statute:

"There is no doubt that the statute contemplates that wherever it is practicable, or unless there is reason to the contrary, the representative of an estate will set off claims of the estate against those of the creditor, so that a final balance may be ascertained by the parties and needless litigation avoided."

The Michigan statute under discussion is common to several states. See *24 C. J. 378,* where it is said:

"Set-Off. The statutes usually provide that, where a creditor presents a claim to the commissioners, or to the court of probate, the personal representative may exhibit claims of the deceased as a set-off to the claim of the creditor, and the commissioners or the court shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be."

Attention is respectfully directed to a most striking similarity of language and phraseology. The *Eckford case* permits "judicial *ascertainment* that, *on striking a balance of just demands,* the Government is indebted to the defendant in an ascertained amount." The Michigan statute directs that the commissioners on claims (or court acting in their stead as the case may be) "shall *ascertain* and allow *the balance against or in favor of the estate as they shall find the same to be.*" Power to

direct or command payment of the ascertained amount, and power to issue execution therefor, are negatived in both instances and, as will be seen from authorities cited above, such powers cannot be implied into the Michigan statutes.

Under the statute a Probate Judge may either hear and determine claims and counterclaims or he may appoint Commissioners on Claims for such purpose *(C. L. Mich. 1929, § 15674; Mich. Stat. Ann. 27.2821)*. If he elects to hear and determine such claims and counterclaims himself, as he did in the present case, the proceedings and determinations are, in law, those of Commissioners *(C. L. Mich. 1929, § 15681; Mich. Stat. Ann. 27.2828)* and they are reviewable in the Circuit Court, not by the statutory practice on appeals from *Probate Court* but by the statutory practice on appeals from decisions of *Commissioners on Claims (McAllen v. Lipson's Estate, 258 Mich. 15)*. The Government actually recognized this rule when it took appeal in the present case from the decision of the Probate Judge, acting as Commissioner on Claims (R. 17).

Acting as such Commissioner the Probate Judge had relevant powers and duties provided by the following statutes:

> "At the expiration of the time limited, or as soon thereafter as they shall have time to complete the hearing of the claims presented, *the commissioners shall make a report of their doings to the probate court, embracing lists of the claims presented, or exhibited in off-set, and stating how much was allowed, and how much disallowed, together with the final balance, whether in favor of the creditor or the estate;* and the report shall state particularly the manner of giving notice to the claimants. Said

commissioners shall also send a copy of their findings in all contested claims to all the parties of interest therein at the time of the filing of their report." *(C. L. Mich. 1929, Sec. 15684; Mich. Stat. Ann. 27.2831.)*

"*The commissioners shall have power to try and decide upon all claims which by law survive against or in favor of executors and administrators,* except claims for the possession or title of real estate; *and may examine and allow all demands,* at their then present value, which may be payable at a future day, including claims payable in specific articles, *and may offset such demands in the same manner in favor of the estate.*" *(C. L. Mich. 1929, Sec. 15685; Mich. Stat. Ann. 27.2832.)*

The Probate Court, as distinguished from Commissioners on Claims, has no control or supervision whatever over the doings and decisions of Commissioners on Claims. The decisions of the latter, in the shape of a report or succession of reports, are final determinations of a judicial tribunal *(Clark v. Davis, supra; Flynn v. Lorimer, supra; Chapoton v. Prentis, supra; Shurbun v. Hooper, 40 Mich. 503).* Appeal from their decisions lies, not to the Probate Court but to the Circuit Court *(Clark v. Davis, supra).* Consequently, even if general power had been given *the Probate Court* to enter money judgments and issue executions (which as we have seen was not given), the present determination of the Probate Judge, acting as Commissioner on Claims, would still not constitute a money judgment as distinguished from a final ascertainment and decision of a specially constituted judicial tribunal. Any doubt on this score is removed by the following cases:

In *McKinney v. Curtis, 60 Mich. 611,* it was forcefully held:

"As to the ground that the case before this Court

heretofore is a bar, it only need be said that *in no sense is a proceeding to have a claim allowed before commissioners, and the decision given by them, a common-law judgment.*"

In *LaRoe v. Freeland, 8 Mich. 530* (followed on this point in *Tyler v. Gallop's Estate, 68 Mich. 187*), the question under discussion was raised and settled by the court *sua sponte*. It was there said:

> "We take occasion to suggest that, under our statutes, the more correct form of judgment in the Circuit Court on Appeal from the allowance of a claim, *would be an adjudication of the allowance of the claim at a certain sum, or a disallowance, and not a judgment against the administrator in the common law form. The statute regards the action of the court as analogous to that of the commissioners:* Comp. L., p. 891, § 2941. *A formal judgment may not be erroneous in law, but is liable to misapprehension, inasmuch as it cannot be literally enforced according to its terms.*"

In *Johnson v. Powers, 139 U. S. 158*, which was an appeal from the Northern District of New York involving outstate effect of proceedings in a Michigan Probate Court, the foregoing rule of *LaRoe v. Freeland* was incorporated in the opinion as follows:

> "The decision of the commissioners (on claims), or of the Circuit Court on Appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *LaRoe v. Freeland, 8 Mich. 530.*"

In harmony with these cases, the instant determination of amount owing by the United States includes no features of a money or common-law judgment and it is

confined to judicial determination of the Government's ascertained indebtedness. After adjudicating a disallowance of the Government's claim as presented the Probate Judge's order reads:

> "It is further ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan, that United States of America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America."

To recapitulate: We respectfully declare that special statutes govern the powers and proceedings of Commissioners on Claims *(C. L. Mich. 1929, Sec. 15674, et seq.; Mich. Stat. Ann. 27.2821, et seq.)*; that special statutes govern appeals to the Circuit Court from determinations of the Commissioners as distinguished from the orders and decrees of the Probate Court *(McAllen v. Lipsons' Estate, 258 Mich. 15)*; that the statutory provision for rehearing, within ninety days, of orders and decrees of the Probate Court (quoted on preceding page 10 of this brief), has no application to decisions and determinations of Commissioners on Claims *(In re Brown's Estate, 280 Mich. 179)*; that the Commissioners (and the Probate Judge when he acts in their place and stead) constitute a special statutory tribunal and are governed by equitable principles in determination of claims against and in favor of the estate *(Foote v. Foote, 61 Mich. 192)*; that they act judicially and their determinations are final in the absence of appeal *(Flynn v. Lorimer's Estate, supra; Chapoton v. Prentis, supra)*, and that they do not and cannot enter judgments *(LaRoe v. Freeland, supra; McKinney v. Curtis, supra)*. Accordingly, since the Probate Judge was acting as a Com-

missioner on Claims when he made the presently criticized judicial determination, we respectfully submit that there can be no reason in assertion that his action constituted anything beyond a final though unenforcible determination or ascertainment of the rights of the Government and the estate in respect to the duly presented claim and counterclaim.

It may be inquired: What is the status of a similar statutory ascertainment of balance as against a private claimant? The answer is that such a determination can be made enforcible only by assumpsit in the Circuit Court, as was done in *Shurhun v. Hooper, 40 Mich. 504*, or by suing out of a writ of *scire facias* in a court competent to render money judgments and issue execution. *Cf. Reeside v. Walker, 11 How. (52 U. S.) 288, 289.* Michigan retains the common law writ of *scire facias* and permits actions in its Circuit Courts thereon. *McRoberts v. Lyon, 79 Mich. 33.*

Again returning to the distinction made by the *Ecklord case*, we respectfully call attention to *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563).* In that case the court of appeals of the second circuit upheld an affirmative ascertainment of amount owing by the Russian Government (the United States was substituted *pendente lite* for the Russian Government as plaintiff and appellant) on determination of claim and counterclaim. We take the following from the affirmed District Court opinion *(4 Fed. Supp. 417)*:

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat

the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. *There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess.*

Settle decree accordingly, but without costs."

Concluding presentation of this point "A," respondent earnestly submits that the distinction made by the *Eckford case* between a judgment on the one hand and a judicial ascertainment or determination of amount on the other, is clear, and that the instant judicial determination qualifies in every respect for accord with such decision. This court obviously intended, when it declared decision in the *Eckford* and *DeGroot cases*, to preserve the sovereign dignity in given case from command of a money judgment collectible by execution and yet, in the interest of complete adjudication and early settlement of dispute, to construe the Act of 1797 as permitting the forum selected by the Government to make judicial ascertainment of amount owing by either party on striking a balance of proper demands.[5]

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5. The instant set-off was duly presented and rejected under Section 951 of the Revised Statutes. See recorded concession of the fact in *281 Mich., at page 198.* Construing said Section 951 the Court of Appeals of the Ninth Circuit said *(United States v. Skinner & Eddy Corp., 35 Fed. 2nd 889)*:

"The Congress of the United States, as early as 1797, granted the right to sue the Government by way of claims for credit, solely as a defense in suits brought by it, *and incidentally to adjudicate the amount of such claims where they had been presented to the accounting officers of the Treasury and by them disallowed in whole or in part.*"

POINT B.

The Probate Court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

It is submitted that this attack upon the jurisdiction is controlled by *United States v. The Thekla, 266 U. S. 328*, wherein opinion was delivered by Mr. Justice Holmes. In that case the United States voluntarily joined in the suit and thereby subjected itself to the court's general jurisdiction to determine all questions legitimately involved including the merits and amount of a properly asserted counter claim. In present case the United States voluntarily entered a state court holding jurisdiction *in rem* over the *res* of an estate[1] and asserted, in accordance with the local statutory practice, a claim against the *res*. In accordance with the mandatory requirements of the same local practice, a counterclaim was duly asserted and it was thereafter upheld on the merits. We submit that there is no essential difference between the act of joining in suit in the one case and the act of entry into court for assertion of claim in the present case, and that the decision of this court in the *Thekla* is a progressively broad announcement of principle which is

(1) *United States v. Bank of New York and Trust Company, 296 U. S. 463, 477, 478, 479; Allison v. Smith, 16 Mich. 405; People ex rel. Fraser v. Wayne Circuit Judge, 39 Mich. 198; Mower's Appeal, 48 Mich. 441; Stevens v. Hope, 52 Mich. 65; Mich. Miss. Society v. Corning, 164 Mich. 396; In Re Brown's Estate, 198 Mich. 563; In Re Meredith's Estate, 275 Mich. 295; Montgomery v. Wayne Circuit Judge, 284 Mich. 430.*

equally applicable to proceedings instituted by the Government in modern courts of law, equity and admiralty. This court said:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it."

> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and, on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases, the question of damages to the colliding vessel necessarily arose, and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. The *Nuestra Señora de Regla (United States v. The Nuestra Señora de Regla), 108 U. S. 92, 27 L. Ed. 662, 2 Sup. Ct. Rep. 287; The Paquete Habana (United States v. Paquete Habana), 189 U. S. 453, 465, 466, 47 L. Ed. 901, 903, 904, 23 Sup. Ct. Rep. 593.* We gather that our conclusion accords with the opinion of the English court. The *Newbattle, L. R. 10 Prob. Div. 33, 54 L. J. Prob., N. S. 16, 52 L. T., N. S. 13, 33 Week. Rep. 318, 5 Asp. Mar. L. Cas. 356; The Tervaete, L. R. (1922) Prob. 259, 272, 91 L. J. Prob., N. S. 213, 38 Times L. R. 825, 67 Sol. Jo. 98, 154 L. T. Jo. 63—C. A. It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."*

The Government contends, however, that this decision is applicable only to maritime proceedings. In turn we contend that there are a number of annihilating answers to such contention. In the first place, the comprehensive rule of the *Thekla* was quoted and followed in *Am. P. & Mfg. Company v. United States, 300 U. S. 475;* in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563),* and in *Guaranty Trust Company v. United States, 304 U. S. 126,* no one of which was instituted in a maritime court or involved maritime questions.

In the *American Propeller case* this court, after quoting (from the *Thekla)* its announced rule versus obstruction "of natural justice against the Government by technical formulas when justice can be done without endangering any public interest," said:

> "If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

In the *Guaranty Trust case* a suit was brought by the United States as assignee of the Soviet Government to recover a bank deposit theretofore owned and possessed by the assignor. The defendant pleaded the statute of limitations. Clearly, no maritime question was involved. In the course of its ruling that the pleaded defense was good as against alleged Governmental immunity therefrom, this court said:

> "By voluntarily appearing in the role of suitor it (the Soviet Government) abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in

suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States v. The Thekla, 266 U. S. 328, 340, 341, 69 L. Ed. 313, 315, 316, 45 S. Ct. 112; United States v. Stinston, 197 U. S. 200, 205, 49 L. Ed. 724, 725, 25 S. Ct. 426; The Davis (United States v. Douglas), 10 Wall. 15, 19 L. Ed. 875; The Siren, 7 Wall. 152, 159, 19 L. Ed. 129, 132.*"

In the second place, the Government's present contention was thoroughly discredited by reasoned thesis of Judge Mack in the very case (*The Gloria, 286 Fed. 188*) which this court affirmed by the Thekla decision. We quote from Judge Mack's ably considered opinion as follows (page 200 of report):

> "*The Nuestra Senora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662,* and *The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900,* mark a considerable advance in the view of the court. Both of these were prize cases; both were cases of wrongful seizure by the Government. And in both cases the court rendered on the counterclaim filed an affirmative decree in favor of the claimant and against the Government as libelant. *It may be possible to urge that a peculiar rule obtains in prize cases, but it is difficult to say that the court based its decisions on any such narrow ground.* Indeed, in *The Paquete Habana,* counsel for the claimant, apparently fearing that the court might draw back from the broad ground taken in *The Nuestra Senora de Regla,* argued that the claim of the owner of the vessel seized was simply for restitution of the property or its cash equivalent. *The court did not, however, adopt any restricted theory of this kind. It placed its decisions on the broad principle of modern law that, the Government having come into the court, the court would determine all questions necessary for the disposition of the entire controversy.* That being the case, the court properly embodied

its determinations in the form of a decree. *It distinguished,* what it had failed to distinguish in the earlier cases, *the rendering of an affirmative judgment or decree from its enforcement or execution.*"

The following decisions support Judge Mack's view that the doctrine here invoked by respondent applies equally to law, equity and admiralty proceedings:

"When a sovereign voluntarily appears in our court, it assumes the character of a private suitor. *The Thekla, 266 U. S. 328.*" *Dexter and Carpenter v. Kunglig, etc., 43 Fed. (2) 708 (C. C. A. 2).* (This was a common law action.)

"To protect its property the United States has all the rights of persons, may sue in the state courts or in its own tribunals, and of course is concluded by the decree rendered even as persons are." (Citing *The Thekla.*) *United States v. American Ditch Association, 2 Fed. Supp. 868 (D. C. Idaho).*

"With all due regard for the powers and attributes of sovereignty, it is well to remember that, when a sovereign comes into a court of equity seeking its aid to enforce its rights, *even as the owner of the public domain* (italics by court), its claim should be tested by the same equitable principles which govern suits between private litigants, unless there be a special statute commanding a contrary rule." (Quoting in support, from the *American Propeller case, the Thekla* rule.) *United States v. Standard Oil Company of California, 21 Fed. (2) 655 (D. C. Cal.)*

"There is nothing to limit the broad principles of the *Thekla* to admiralty cases only." *The Barbara Cates, 17 Fed. Supp. 244 (D. C. Pa.).*

"The United States, having presented its claim against the bankrupt estate and having litigated the

claim before the court of competent jurisdiction, was bound by the court's judgment as any ordinary litigant would be, and this court may not exercise jurisdiction to review such final judgment except in accordance with the statutes" (citing the *Thekla*). *United States v. East, 80 Fed. (2) 134 (C. C. A. 8).*

"There is no distinction between an admiralty case and one at law when we come to consider the principle above announced by the Supreme Court." (Referring to the *Thekla.*) *United States v. Moscow-Idaho Seed Co., 14 Fed. Supp. (D. C. Idaho) 135.*

"When all is considered, we are brought to the conclusion that the United States, by its intervention and participation in the suit, consented, impliedly at least, that reasonable allowances be made from the fund, under the rule before stated, for the services and expenses of the next friend and his attorneys" (citing the *Thekla* and the *Siren, 7 Wall. 152).* (This was a suit in equity and not a maritime proceeding.) *United States v. Equitable Trust Co., 283 U. S. 745.*

The only case we have been able to find, which tends to uphold contention that the *Thekla* applies solely to maritime proceedings, is *Danforth v. United States, 102 Fed. (2) 5.* That case was reversed in part and affirmed in part *(Danforth v. United States,* decided December 4, 1939, No. 309). While this court did not find it necessary to rely upon the *Thekla* or the doctrine thereof, it pertinently reversed the ruling of the Court of Appeals that a contract between the Government and the petitioner could not be made effective, as a determination of value, in a condemnation proceeding instituted by the United States.

Lastly, we maintain that the opinion of this court in the *Thekla* contains one feature which, aside from its

broad and comprehensive language, conclusively denies intent that the declared doctrine be confined to proceedings in admiralty. We refer to the passage (*266 U. S., at page 340*):

> "The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill. *Colombian Government v. Rothschild, 1 Sim. 94, 103, 57 Eng. Reprint 514, 5 L. J. Ch. 43, 27 Revised Rep. 171; Goldthwait v. Day, 149 Mass. 185, 187, 21 N. E. 359.*"

This court will find, and we refer to our hereinafter argued "Point C" for relevant facts, that the instant claim and counter claim arose out of similar and connected undertakings which were mutually agreed upon by and between McLouth and the Fleet Corporation. Furthermore, proceedings in a Michigan Probate Court toward adjustment of claim and counter claim, viewing them as equitable in nature as they should be viewed (*Foote v. Foote, 61 Mich. 192*), actually constitute an equitable accounting and adjustment of mutual credits.

Goldthwait v. Day, which was cited by this court in support of the last quoted passage, is a case wherein the opinion was delivered by Mr. Justice Holmes as a member of the Massachusetts Supreme Court. It was there said:

> "A mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other *pro tanto* at once as they accrue. The only claim of either party is to the balance. See *Tyler v. Boyce, 135 Mass. 558, 561; Fanning v. Chadwick, 3 Pick. 420; In re Steamer Company, L. R. 6 Ch. 822, 830; Grove v. Dubois, 1 Term R. 112, 115, 116; Tompkins v. Willshear, 5 Taunt. 431, 432, and note*

(a); Farrington v. Lee, 2 Mod. 311, 312, 1 Mod. 268, 269. When a bill is brought upon such an account it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. *Colombian Government v. Rothschild, 1 Sim. 94, 103; Clarke v. Tipping, 4 Be. v. 588.*"

On the subject "Accounts and Accounting," *Goldthwait v. Day* is cited in support of the text in *1 C. J. 630*, which we quote as follows:

"*Independence of Defendant's Claim; Decree for Balance Due Defendant.* Defendant's claim is not an independent one, but is admitted and asserted by plaintiff so far as defendant can prove his items, and provided they exceed those on plaintiff's side, because the court, having acquired jurisdiction of the cause, will dispose of the entire matter and decree for one or other of the parties as the account may stand."

In *1 C. J. S., 671*, the foregoing text of *Corpus Juris* is reaffirmed in the following language:

"An offer to do equity, by averring plaintiff's willingness to pay any balance that might be found due defendant from him, was formerly a requisite to a bill in equity for an accounting; but it is now the general rule that the mere filing of the bill implies an offer to pay such balance to defendant, without a specific averment to that effect";

and *Goldthwait v. Day* is copiously quoted from in support of the text on subsequent page 674.

Since, for the purposes of the jurisdictional question dealt with and settled in the *Thekla*, a libel in admiralty is like a bill for an account, we respectfully submit that such a libel is even more relevantly analogous to a claim against the *res* of an estate in charge of a court which is asked to allow the claim. In each case the proceeding is substantially *in rem*. In each case the claimant, if his cause be meritorious, is possessed of a lien which the forum is jurisdictionally authorized to adjudicate (for declaration of this rule as applicable to Michigan probate courts, see *Lafferty v. People's Savings Bank, 76 Mich. 46)*. In the maritime court the judicial duty is to proceed to "determination of all the questions legitimately involved, even when it results in a judgment against the United States." In the Probate Court, on presentment of claim against an estate, it is the commanded duty of the representative to exhibit all counter claims and of the Court or Commissioners to ascertain and allow the balance against or in favor of the estate. Presumptively, a person or sovereign filing claim with such a Court knows the statutory powers, duties and functions of the forum selected and of the representatives of the estate libeled. The claimant, regardless of station, is charged with knowledge that the Court or Commissioners cannot jurisdictionally consider his claim without ascertaining the amount of a meritorious offset. If, as in the present case, his claim is based on contractual undertakings which he knows have resulted in counter credits of certain or uncertain amount,[2] is it not reasonable that the voluntary filing of his claim against the *res*, like the

2. The Government has always conceded obligation to McLouth's estate for the item of $647.65, termed "just compensation," which is mentioned and dealt with in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471.* See pages 61-62 hereinafter (appendix).

filing of a libel or bill for account, be taken as an imported "offer to pay the balance if it should turn out" against him?

Pertinent similarity between a bill for account and an asserted claim in Probate Court is shown by *Foote v. Foote, 61 Mich. 192,* from which we quote:

> "The proceeding authorized by the statute for the purpose of examining, allowing, and adjusting claims against an estate, whether before commissioners or the courts, is an equitable one, and governed by equitable principles; and the administrator of Elisha Foote's estate, in this case, was entitled to avail himself of any equitable, as well as legal, defense which existed against the claim presented for allowance against Elisha's estate."

The Government's entire case fails if its counsel err in assertion that the *Thekla* applies only to maritime cases. On strength of the foregoing presentation we respectfully submit that they do so err, and that the judgment of the Michigan Supreme Court accords in every respect with a now judicially approved rule of beneficence and justice.

We next refer to the extended arguments for Governmental convenience that are contained in the Solicitor General's brief. It is there said, in sum, that any recognition of authority in favor of the state courts to make judicial determination of counterclaims against the Government would be unduly burdensome and it is suggested, for many ably argued reasons, that great public detriment will result if this court does not announce disapproval.

We doubt that present Government counsel, in presenting this argument, have considered or are familiar with the background of facts which this case fronts.

If the Government had chosen to handle this case in accordance with the rules it could, if desirous, have obtained a final determination *in its own courts* of the estate's counterclaim. When it sued the administrator (who was then represented by other counsel) in the United States District Court to recover judgment for McLouth's original indebtedness to the Fleet Corporation, its counsel paid no heed to the established rule that a suit in District Court to establish a claim or right in an estate must be prosecuted in accordance with the local law and that the District Court, in such a case, "is administering the laws of the state of the (decedent's) domicile and is bound by the same rules that govern the local tribunals." *Security Trust Company v. Black River National Bank, 187 U. S. 211; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33; Pufahl v. Parks, 299 U. S. 217.* Despite the fact that local law gave creditors of an insolvent estate right to notice and hearing in proceedings brought to establish a claim,[3] the creditors of this insolvent estate were given no notice whatever of the District Court suit against the administrator and consequently were not bound by the District Court's judgment. If such creditors had been made parties to the Government's suit in District Court, as should have been done both under local law and by express declaration of this court in

3. (See *Dickinson v. Seaver, 44 Mich. 624,* where the point was squarely decided in favor of persons interested in an estate who had not been made parties to a District Court suit, and statement of applicable local authority contained in the Circuit Court's original opinion in this case—appendix, page 58.)

United States v. Bank of New York and Trust Company, 296 U. S. at page 480, then such creditors would have been obliged to see that a properly asserted counterclaim was presented and proved or suffer adjudicating finality of the District Court's judgment.

The effect of the Government's unfortunate omission, in connection with the District Court suit against the administrator, was this: The judgment in favor of the United States became subject, in the Probate Court, to unfettered defense by the creditors and they, represented in part by undersigned counsel, succeeded in obtaining judicial review and consideration of the estate's counterclaim on the merits. In such connection it is interesting to note that Government counsel finally had to concede that the District Court judgment was ineffective as an adjudication *(281 Mich., at page 199),* and the upshot was that the judgment was ultimately received as evidence only of the Government's claim.

There is thus no room for argument that affirmance of the Michigan Supreme Court's judgment will affect the Government's undoubted right to final adjudication, in its own courts, of rights of action it may there properly present against a decedent's representatives and other interested parties. *Proper* assertion of such a right of action in a District Court suit, against interested parties as defined by local law, results in an adjudication which undoubtedly binds the defendants and the state Probate Court on all questions preceding distribution. *Commonwealth Trust Co. v. Bradford, 297 U. S. 613.*

Returning to the main point under discussion, we proffer for consideration Judge Mack's prophetic review

in the *Gloria, 286 Fed. 188.* The following connected excerpt is taken therefrom:

"As the right of set-off and counterclaim gradually comes to be regarded as affecting the substantive rights of the litigants, one would expect to find courts reluctant to give judgment in favor of a sovereign state, where judgment would, in the circumstances, be denied a private litigant because of the right of set-off or counterclaim. Once the first hurdle is past, and it is recognized that the defendant in suit brought by a sovereign state is not limited in his defense to strict common law recoupment, but may assert the broader right of set-off, *it may be expected that a modern court of equity, of admiralty, or even of law will be impatient of any restrictions on its jurisdiction to determine judicially all questions involved in the controversy or controversies submitted. While a court may have no power to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant.* A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

"A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, *it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants.* Although, perhaps, the defendant should not be permitted to assert any counterclaim

which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant.

There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, *once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice.*"

As we have seen Judge Mack was duly affirmed by this court in *United States v. The Thekla, 266 U. S. 340.* The wholesome doctrine of the *Thekla* has since aided decision in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (certiorari denied, 299 U. S. 563); American P. and Mfg. Company v. United States, 300 U. S. 476; Guaranty Trust Company v. United States, 304 U. S. 134; United States v. United States Fidelity & Guaranty Company, 106 Fed. (2) 804* (now under review here—No. 569), plus a number of lower court cases, and it is submitted that this rule, now wholly approved, marks completion of a decidedly progressive advancement in judicial thought. During the past twenty years the Government has done a great portion of its work through a constantly increasing number of corporations created by Acts of Congress. The functions of these corporations have spread to and are interlaced in

the lives and business of the farmer, the laborer and the business man. If these corporations are to function expeditiously; if citizens are to be encouraged in dealing with them, the courts should be unhampered in judicial adjustment and determination of their undertakings. As this court noted in *Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 389:*

> "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of Government in economic affairs have greatly extended the use of independent corporate facilities for Governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging Governmental functions, and without exception the authority to-sue-and-be-sued was included.
>
> Such a firm practice is partly an indication of the present climate of opinion which has brought Governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The instant claim and counterclaim grew out of contractual obligations undertaken between McLouth and one of these Governmental instrumentalities, i. e., the Emergency Fleet Corporation. The latter has recently been dissolved and its contractual obligations have been voluntarily assumed by the United States (Merchant Marine Act, June 29, 1936, c. 858, Title II, Sec. 203, 49 Stat. 1987). The contractual obligation of the Fleet Corporation to McLouth's estate has been adjudicated. Can there remain any legal or moral bar to judicial computation of amount and recording thereof by the court which the Fleet Corporation's successor has voluntarily selected?

POINT C.

Immunity from affirmative judgment or judicial ascertainment in this case, if any, was waived when the United States, having already taken a general assignment of assets and receivables from the Fleet Corporation, dissolved the latter and assumed its obligations by the Act of June 29, 1936.

Preliminary Statement.

The Fleet Corporation was an instrumentality of the Government. *United States ex rel. Skinner and Eddy v. McCarl, 275 U. S. 1; U. S. Shipping Board Fleet Corporation v. Harwood, 281 U. S. 519; Sloan Shipyards Corporation v. U. S. Shipping Board Fleet Corporation, 258 U. S. 550.* "But (quoting from the *McCarl case*) it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct and operate merchant vessels. * * * Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings *(Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp. 258 U. S. 549)*, and its employees are not agents of the United States subject to the provisions of § 41 of the Criminal Code *(United States v. Strang, 254 U. S. 491)*." Likewise, the Fleet Corporation was at all times during its corporate existence answerable in suit upon its contracts, regardless of having contracted "for and on behalf of" or "representing" the United States. *United States ex rel. Skinner & Eddy v. McCarl, supra; U. S.*

Fleet Corporation v. Harwood, supra; Sloan Shipyards Corporation v. United States Fleet Corporation, supra. With these declared principles in mind, we respectfully submit the following outline showing basis in fact of the instant claim and counterclaim.

(a) *Facts Underlying The Government's Claim As Filed In Probate Court.*

Conforming in every material respect to the contracts dealt with in the three last cited decisions of this court, the original contract was entered into between the Fleet Corporation, named as "representing the United States," and McLouth. The contract of settlement between the parties, executed May 24, 1920, designated the Fleet Corporation as "acting for and on behalf of the United States," and a material provision of the contract was that title to all materials then stored with McLouth should rest in the Fleet Corporation as distinguished from the United States (see opinion of Michigan Supreme Court, *281 Mich. 193, 194,* and appendix, page 55). It was McLouth's conversion of these stored materials[1] that gave rise to the cause of action which formed the basis of the Government's claim against McLouth's

(1) McLouth died in 1923 (R. 71). We make this reference to show that the conversion by McLouth (*281 Mich., at page 196*) occurred and the resulting cause of action accrued to the Fleet Corporation before the latter's assets and receivables were assigned in 1923 to the United States. The exact date and circumstances showing accrual of the cause of action do not appear in the present record and, in the absence of such facts, we simply say that we do not believe the act of June 5, 1920 (C. 250, § 4, 41 Stat. 990; 46 U. S. C. A., § 863), affected the then status of rights and equities as between McLouth and the Fleet Corporation. *Providence Eng. Corp. v. Downey Shipbuilding Corp. (C. C. A. 2) 294 Fed. 641 (Cert. Den. 264 U. S. 586).*

estate (fact declared from former appeal record on page 4 of instant petition for writ of certiorari), and it is thus clear that the cause of action exhibited by the Government's claim originally accrued to the Fleet Corporation and not to the United States.

(b) *Facts Underlying Counter-Claim Or Set-of As Asserted In Probate Court.*

When the Fleet Corporation made final settlement with McLouth it, and not the United States, undertook with McLouth to pay his outstanding debt to Ingram-Day Lumber Company. When Ingram-Day Lumber Company sued McLouth to recover such debt, the Fleet Corporation's legal staff took complete charge of the defense.[2] The unsuccessful defense resulted in a judgment of this court against McLouth and consequent allowance[3] of a claim against McLouth's estate in the sum of $58,089.04. The estate's counter-cause of action thereupon arose against the Fleet Corporation on its covenant to assume and pay the Ingram-Day debt.

* * *

We assert on these facts that the cause of action, upon which the instant claim of the Government was predicated,

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(2) The fact that McLouth was exclusively defended by Government counsel fully appears in the successive reports of *Ingram-Day Lumber Company v. McLouth, 6 Fed. (2) 471; 13 Fed. (2) 581; 275 U. S. 471.* The judgment against McLouth in *275 U. S. 471*, because the case had been exclusively defended by the Fleet Corporation, became conclusive of the Fleet Corporation's liability over to McLouth's estate. *Washington Gas Company v. District of Columbia, 161 U. S. 316, 329.*

(3) The claim was duly allowed on October 13, 1932 (R. 14).

originally arose in favor of the Fleet Corporation[4] and that it passed to the United States by the general assignment of 1923. The fact of such assignment is shown by *United States ex rel. Skinner and Eddy v. McCarl, supra,* in the following language:

> "In 1923, the Fleet Corporation assigned to the United States all of its assets, including accounts against divers persons for the payment of money. Thus, the United States is the owner, either as principal or as assign of the Fleet Corporation, of all the claims against Skinner & Eddy."

We also assert on such facts, with particular reliance on the *Harwood case, supra,* that the estate's counterclaim arose against the Fleet Corporation[5] as distinguished from the United States and that the United States voluntarily assumed payment thereof by the Act of June 29, 1936, to which we now respectfully direct attention.

The provision of the Merchant Marine Act of 1936 to which we refer is as follows (46 U. S. C. A., § 1113):

> "(a) The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers,

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(4) While the United States and the Fleet Corporation have together been generally referred to in these proceedings as the "Government," they are nevertheless distinct and separate for the purposes of present discussion. As evidence that the cause of action accrued to the Fleet Corporation and not to the United States, we refer to *U. S. Fleet Corporation v. Harwood, 281 U. S. 519.*

(5) The corporate name was changed from U. S. Shipping Board Emergency Fleet Corporation to U. S. Shipping Board Merchant Fleet Corporation by the Act of February 11, 1927. C. 104, § 1, 44 Stat. 1083 (46 U. S. C. A., § 810a).

and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission upon behalf of the United States, under the supervision of the Attorney-General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in Section 226, Title 31, United States Code, for reporting judgments against the United States in the Court of Claims." (June 29, 1936, C. 858, Title II, § 203, 49 Stat. 1987).

It is submitted that the United States, having taken over certain of the property of the Fleet Corporation by the Act of June 5, 1920;[6] having taken a general assignment of assets and receivables from the Fleet Corporation in 1923, and thereafter having dissolved the Fleet Corporation with voluntary assumption of the latter's contractual obligations by the Act of June 29, 1936, stands in the position of an assignee who has assumed his assignor's debts and that it is entitled to assert the same rights and immunities in this litigation, and no more, that the Fleet Corporation could have asserted as claimant. The Fleet Corporation as claimant clearly would not have been immune, under any circumstances, from affirmative judgment or determination had it instituted the proceedings in Probate Court;[7] hence the United States as the Fleet Corporation's successor is in the

(6) C. 250, § 1, 41 Stat. 988, 990. (46 U. S. C. A. § 861 *et seq.*).

(7) In addition to the *Sloan Shipyards case*, the *Harwood case*, and the *McCarl case*, hereinbefore cited, this conclusion finds clear support in *Keifer and Keifer v. R. F. C., 306 U. S. 387.*

same position. In support of this contention we rely upon the following authorities.

In *United States v. Buford, 3 Pet. (28 U. S.) 12,* this court reviewed contention that the United States, suing as assignee of a claim against which a statute of limitations had run, was immune from the defense of limitations. It was held:

> "As more than five years had elapsed from the date of the receipt to the assignment, the statute of limitations will bar a recovery of this claim, *unless the transfer of it to the United States has changed its character,* or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between Morrison and Buford, the statute has been waived.
>
> *It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor.* If the character of the claim be so changed, as to exempt it from the operations of the statute of limitations, after the transfer, such transfer cannot have the effect to take the claims out of the statute when it has run."

In *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (Cert. Den. 299 U. S. 563),* it was said:

> "In these circumstances it appears that the State of Russia held a deposit to its credit at the bank, the bank owned promissory notes of that depositor payable at the bank, and, when sued, the bank properly resisted to the extent of its set-off. *The United States suing, having no more rights than its assignor, is subject to that set-off.*"

In *United States v. Bank of New York and Trust Company (C. C. A. 2nd), 77 Fed. (2nd) 869 (affirmed 296 U. S. 463)*, it was said:

> "It is enough that we assume without deciding that the plaintiff (United States) has all the rights which the depositing corporation would, if now in existence, possess. *The transfer of those rights to the plaintiff did not enlarge them because the assignee happened to be the United States.* The United States has no greater rights than those of an assignor. *United States v. Buford, 3 Pet. 12, 30, 7 L. Ed. 585; Ritter v. United States (C. C. A.), 28 Fed. (2d) 265.*"

In *Guaranty Trust Company v. United States, 304 U. S. 126*, the question, stated by this court, was "Whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, *whether the assignment* of November 16, 1933, *by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations.*" After holding that the Soviet Government, by voluntarily submitting itself to the jurisdiction, was subject to the defense of limitations, this court decided that the United States as assignee was in no better position in the litigation and was likewise subject to the same defense. We respectfully call attention to the following relevant excerpts from the opinion:

> "Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on re-

finements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner."

"The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States v. Buford, 3 Pet. 12, 30, 7 L. Ed. 585, 591; Rex v. Morrall, 6 Price 24, 28, 30, 146 Eng. Reprint 730.*"

"There is nothing in either document (the agreement and assignment of the Soviet Government and the President's letter in reply) to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States v. Arredondo, 6 Pet. 691, 748, 8 L. Ed. 547, 568; Haver v. Yaker (Jecker v. Magee), 9 Wall. 32, 34, 19 L. Ed. 571, 573; Looley v. United States, 182 U. S. 222, 230, 45 L. Ed. 1074, 1081, 21 S. Ct. 762;*

Nielsen v. Johnson, 279 U. S. 47 52, 73 L. Ed. 607, 610, 49 S. Ct. 223; Todok v. Union State Bank, 281 U. S. 449, 454, 74 L. Ed. 956, 960, 50 S. Ct. 363. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations."

Our contention rests partly upon the status of an assignee suing, partly upon the necessary implications of Congressional action. Governmental immunity from suit can be waived by necessary implication. *United States v. Minnesota, 305 U. S. 388.* It is submitted, aside from the Government's status as an assignee, that an implied waiver occurred in the present case when Congress put the Fleet Corporation out of existence and caused the latter's obligation to McLouth's estate to be assumed by the United States, because such waiver is necessarily incident to full intended effect of the act of June 29, 1936. *Cf. United States v. Jones, 109 U. S. 513, 521.*

An inferred intent on the part of Congress to destroy an existing remedy against the Fleet Corporation, without replacing same with a commensurate one against the United States,[8] would mean injustice. On the other hand an implication, consistent in every respect with contemporaneous disfavor of governmental immunity from

(8) It should be observed that respondent, as holder of an adjudicated contractual obligation of the now dissolved Fleet Corporation, would be remediless in the courts (including the Court of Claims) on the Fleet Corporation's covenant if the implication of waived immunity were not to be applied here.

The instant counter-cause of action is based upon a contract "*containing no words purporting to bind the United States*" *(Harwood case, supra)*, and consequently is not founded upon a "contract, express or implied, with the Government of the United States," within the language or meaning of the Court of Claims Act.

suit *(Keifer and Keifer v. R. F. C., 306 U. S. 391)*, that Congress purposed the United States should assume the status as well as the debts of its corporate agency for the winding-up purposes of the Act of 1936, means equity and justice and partakes of reason.

The question presented is an important one. It is fair to assume that Congress some day will find it advisable to dissolve, in much the same manner, the Reconstruction Finance Corporation and numerous other governmentally created corporations which, like the Fleet Corporation, are subject to suit upon their undertakings. Unless Congress explicitly takes care of the situation each time it dissolves such a corporation, the present question is bound to recur.

CONCLUSION.

More than 19 years ago the Fleet Corporation, a now dissolved instrumentality of the Government, undertook with McLouth that it would assume and pay his debt to Ingram-Day Lumber Company. The promise has never been kept and the Government has meanwhile shamefully litigated Ingram-Day Lumber Company and a small estate through twelve separate decisions of various state and federal courts in continual effort to evade the Fleet Corporation's promise. Notwithstanding that Congress once enacted a bill for payment of the debt to Ingram-Day Lumber Company,[1] and notwithstanding that Presidential objection to the bill[2] has now been

1. 73rd Congress, 2nd Session, H. R. 7615, S. 854.

2. The bill was vetoed by President Roosevelt for the following reason: "Disapproved because no provision is made for the Government's counterclaim." Congressional Record, Vol. 78, Part 11, page 12457.

satisfied through *pro tanto* application of the Government's claim to the Ingram-Day debt, the Government continues this litigation in repudiation of an undertaking it voluntarily assumed by the Act of June 29, 1936, even though there can now be no question as to the fact or amount of its adjudicated liability.

This court made final adjudication, in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471,* of the fact and amount of McLouth's debt to Ingram-Day Lumber Company, and the Supreme Court of Michigan made final adjudication, *on former appeal,* of the Government's liability to pay such debt. We quote from the Michigan Supreme Court's opinion on such former appeal *(281 Mich., at page 200):*

> "The judgment *(275 U. S. 471)* became the liability of appellant (United States) either as principal or as assignee of the Fleet Corporation."

Consequently, if the salutary rule of the Thekla is to be unfettered, and we suggest that this court's opinion definitely declares such intention and purpose, the Michigan Supreme Court's present judgment is right in law as a judicially wholesome circumvention of the "prerogative of dishonesty" (Vol. LIII, No. 2, Harv. Law Rev., page 336).

We respectfully submit, in conclusion, that the present case is governed by a decision of this court which ended, once and for all, the Government's originally alleged right to submit partially instead of wholly to the jurisdiction of a court it has voluntarily entered as a suitor. We also submit that the determination of amount owing by the Government, on judicial settlement and approval

of claim and counterclaim in this case, does not offend the early decisions of this court upon which the Government relies. Aside from these considerations respondent asserts, with respect and earnestness, that the United States actually stands in the shoes of the Fleet Corporation for the purposes of this litigation and that it waived immunity from full adjudication of all questions legitimately involved when it took assignment of the instant claim, voluntarily prosecuted same in the state court and voluntarily assumed payment of the estate's counterclaim.

On the foregoing presentation respondent respectfully submits that the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX.

Opinion of Circuit Court of Michigan which was reviewed and affirmed by Michigan Supreme Court *In re McLouth's Estate (United States v. Shaw), 281 Mich. 191.*

(A certified copy of this opinion is herewith filed with the Clerk of the Supreme Court of the United States.)

STATE OF MICHIGAN—In the Circuit Court for the County of St. Clair.

In Re The Estate of Sydney C. McLouth, Deceased.

John C. Shaw, Administrator De Bonis Non of said Estate; Jacob S. Goldman and Ingram-Day Lumber Company,
Appellants,
v.
United States of America,
Appellee.

OPINION, SUBSTANCE OF JUDGMENT AND STATEMENT OF REASONS THEREFOR.

Appellants have fairly stated the material facts in their brief. The following statement, with minor changes and additions made by the court, is taken therefrom:

Sydney C. McLouth, a resident of St. Clair County, deceased September 22, 1923. His estate has been in the course of administration since that date under the jurisdiction of the Probate Court for said county. Mr. McLouth was insolvent at the time of his decease and his

estate has at all times been insufficient to pay all debts due from him. Hearing of claims against his estate was duly closed several years before the instant claim was filed, and dividends totaling fifteen per cent were meanwhile paid on general claims.

In October of 1933, the United States of America filed the instant claim against Mr. McLouth's estate and petitioned the Probate Court for its allowance. The claim is based entirely on a judgment entered April 25, 1933, by the District Court of the United States, Eastern District of Michigan, Southern Division, in favor of United States of America as plaintiff and against John C. Shaw, administrator of said estate, as defendant. The suit resulting in the judgment was commenced against the administrator after the decedent's death, no creditor of the estate was made party thereto and it is not claimed that any one of them ever received notice of the pendency of the suit and the progress thereof until after the instant claim was filed.

The judgment, amounting to $40,165.40, represents the total verdict found in favor of the Government on all three counts of its declaration in the case. In the first count, the Government alleged that in March of 1921 it, acting through United States Shipping Board Emergency Fleet Corporation, sold Mr. McLouth a quantity of lumber which he did not fully pay for, leaving a balance due from him of $7,134.15, which amount, with accrued interest thereon, totaled $11,449.00 at the time of trial. In the second count, the Government alleged that in June of 1922 it, acting through the Fleet Corporation, sold Mr. McLouth three marine engines which he did not fully pay for, leaving a balance due from him of $1,000.00, which amount, with accrued interest thereon, totaled $1,550.00 at the time of trial. Liability of the estate under such counts was admitted by the administrator

(then represented by other counsel) in open court, no issue as to such liability was presented, and the trial judge instructed the jury to find for the Government on such counts in the respective totals noted above.

The third count represents a claim, duly proved in the District Court action, for the value of materials bailed to the decedent and not accounted for by him. Subtracting the total of the items so admitted, viz., $12,999.00, from the amount of the total verdict, leaves a balance of $27,166.40. The latter figure represents the amount of the verdict and judgment under the third count.

Objections to the claim as filed were regularly entered and submitted in the Probate Court by the administrator and by two creditors whose claims had theretofore been duly allowed against the estate. The Probate Court, after due notice and hearing, allowed the claim in full and granted preference to same under Section 3466 of the Revised Statutes of the United States and the third subdivision of C. L. Michigan, 1929, Section 15599. The administrator and the two objecting creditors have duly appealed from such judgment to this court.

The instant claim, and the set-off urged against same, are based upon the following facts shown in evidence:

On August 21, 1918, a written contract was entered into between United States Shipping Board Emergency Fleet Corporation and Mr. McLouth for construction of four ocean-going tugs. This contract is entitled:

"Contract Between Sydney C. McLouth
and
United States Shipping Board
Emergency Fleet Corporation."

Its opening paragraph reads:

"Contract made this 21st day of August, 1918, between Sydney C. McLouth, an individual, party

of the first part (herein called the Contractor) and the United States Shipping Board Emergency Fleet Corporation, Corporation organized under the laws of the District of Columbia (herein called the Owner), representing the United States of America, party of the second part,"

and its fifth paragraph reads:

"TITLE—

It is agreed that title to all vessels, either completed or under construction, insofar as they shall have been inspected and approved by the Owner, shall be in the United States of America, and that the title to all material for the furtherance of work under this contract, however and by whomsoever contracted for, or assembled, or set up in the shipyard, or used in the construction of the work under this contract, shall be in the Owner at all times."

On September 17, 1918, a supplemental contract was entered into in writing between the parties providing for construction of five additional tugs. This contract is a duplicate of the construction contract of August 21, 1918, insofar as the quoted provisions are concerned.

After the Armistice was signed, work under these ship construction contracts was suspended by the Fleet Corporation and it thereupon entered into contracts with the decedent for storage at his shipyard of the tackle, equipment and paraphernalia originally intended for the hulls built in pursuance of such construction contracts. The storage contracts are evidenced by an exchange of letters between the Fleet Corporation and Mr. McLouth dated November 20, 1919, and November 26, 1919, and by formal written contract between the Fleet Corporation and Mr. McLouth dated October 1, 1920.

It is unquestioned that the lot of ship materials bailed to Mr. McLouth by these contracts disappeared from his warehouse and, following his death, that same could not

be accounted for or produced by his representatives. This fact, i. e., breach by Mr. McLouth of the storage contracts, gave rise to the cause of action set forth in the third count of the declaration above mentioned.

On May 24, 1920, a written contract was entered into between Mr. McLouth and the Fleet Corporation, designated as "acting for and on behalf of the United States of America," providing for cancellation of the ship construction contracts and for complete adjustment of the rights of the parties thereunder. This contract contains the following pertinent clauses:

> "Whereas, the Contractor represents that for the purpose of performing the work called for by said Original Contract, he has made various commitments and subcontracts for materials, supplies, etc., prior to the time when he received notice from the Owner to suspend operations on the hulls as hereinbefore mentioned, and
>
> Whereas, the parties hereto now desire to have said subcontracts and commitments adjusted and paid, and
>
> Whereas, the Contractor has now presented to the Owner all its claims of every nature in connection with the suspension of said Original Contract, and
>
> Whereas, the parties hereto now desire to cancel said Original Contract and by this agreement to compromise, adjust and make full and final settlement of all matters in connection therewith."
>
> "ARTICLE II.
>
> The Contractor hereby bargains, sells and conveys unto the Owner all of its right, title and interest in and to said subcontracts and commitments in connection with the Original Contract now outstanding and unpaid, which a proper audit by the Owner shall show to have been properly incurred for the performance of the work under the contract, and which did not exceed the requirements of the Contract; and the Owner shall forthwith adjust and pay such of said subcontracts and commitments as shall in the

judgment of the Owner, be proper under the contract."

A schedule of commitments approved for payment under said Article II was drawn up by the Fleet Corporation and forwarded Mr. McLouth by letter of August 9, 1920. This letter expressly declares:

> "There is attached copy of Schedule 5 'Commitments' which are to be assumed, adjusted and settled by this corporation under the terms of the adjustment agreement with yourself dated April 21st, 1920, and supplemental thereto dated May 24th, 1920."

One of the commitments of Mr. McLouth included in the schedule forwarded with this letter was one in favor of Ingram-Day Lumber Company in the sum of $44,000.00. Neither the Fleet Corporation nor the Government has ever paid or adjusted this commitment. Ingram-Day Lumber Company accordingly sued Mr. McLouth on the commitment and ultimately recovered judgment in the case in the sum of $42,789.96 *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471; 72 L. Ed. 378)*. Defense of the suit, from inception to end, was completely taken over and controlled by the Fleet Corporation and in turn by the Government. The judgment entered in the case forms the basis of a claim against the estate which was duly allowed October 13, 1932, in favor of Ingram-Day Lumber Company. The claim so allowed exceeds in amount the instant claim as presented and appellants contend that the latter is extinguished by the former under Section 951 of the Revised Statutes of the United States.

FIRST: The only proof of its claim which the Government has offered is the judgment which it recovered in District Court against the administrator. Appellants contend that the judgment is jurisdictionally defective

for want of compliance, in the suit leading up to the judgment, with local law requiring notice to all interested parties. The contention is unassailable and must be upheld. Service of process on the administrator only, without a showing of some sort that the creditors of the estate had authorized him to represent them, conferred no jurisdiction on the District Court to enter judgment in the case binding upon or affecting the rights of such creditors. Under local law the creditors were entitled to notice of any suit brought to establish a claim against the estate, and this local rule was binding upon the District Court in the suit which led up to the judgment in question. See *Compiler's Sections 15680 and 15681, Michigan C. L. 1929; Day v. Dullam, 235 Mich. 516; Security Trust Company v. Black River Bank, 187 U. S. 221; Waterman v. Canal-Louisiana Bank & Trust Company, 215 U. S. 35,* and *Pufahl v. Parks (U. S.), 81 L. Ed. 73.* The judgment consequently has no probative force against appellant creditors.

The only claim which has been established against the decedent's estate is the one conceded by appellants in open court; that is, the claim exhibited by the third count of the Government's declaration in the District Court suit. The amount thereof is $27,166.40, plus accrued interest thereon.

SECOND: It will be noted that the various contracts and agreements, out of which the instant claim and counter-claim arose, were exclusively between the decedent and the Fleet Corporation. As in *Harwood v. Fleet Corporation,* 281 U. S. 519, the contracts between the parties "contained no words purporting to bind the United States or in terms restricting the liability of the petitioner (Fleet Corporation)." The Fleet Corporation was a private corporation, bound in every way to its obligations as are individuals and other private cor-

porations. If the instant claim, which originally accrued to the Fleet Corporaton in its own right, had been presented in the Probate Court by the Fleet Corporation instead of the Government, it would clearly be subject to proper set-off. See *Sloan Shipyards Corporation, 258 U. S. 549; United States v. McCarl, 275 U. S. 1; United States v. Wood, 290 Fed. 109; 263 U. S. 678.* Why then, simply because the Government is the Fleet Corporation's assignee (See *U. S. v. McCarl, supra*), should the instant claim be thereby immunized from proper set-off? The fact of assignment to the Government does not of itself free the claim from such set-off (see *United States v. Bank of New York, 77 F. (2) 869, affirmed 296 U. S. 463*), and the Government apparently does not contend so.

The principal position of the Government with reference to this set-off is that the Probate Court, and in turn this Court, is without jurisdiction to hear and determine a set-off or counter-claim in a suit brought by the Government, and reliance is had upon the standard defense that the Government cannot be sued without its consent. The legal conclusion is correct but the premise is erroneous. Congressional consent to the presentation and determination of such a set-off is to be found in Section 951 of the Revised Statutes of the United States (28 U. S. C. A., Section 774). This section authorizes, in suits brought by the Government against individuals, presentation and determination of credits by way of set-off, provided the interposed claims for credit have been properly submitted to and rejected by the designated officer or officers of the Government. The requirement of the section, as to submission and rejection, has been duly complied with by the administrator since the decision in *Shaw v. United States, 75 F. (2) 175*, and no claim to the contrary is urged by the Government.

The Government contends, however, that Section 951 of the Revised Statutes is not applicable to suits brought by the Government in State courts. No authority is cited in support of this contention and it is overcome, in my opinion, by the construction that was placed on the section in *United States v. Wilkins, 19 U. S. 137; Watkins v. United States, 76 U. S. 762; United States v. Fillebrown, 7 Peters 28, 8 L. Ed. 596,* and *United States v. Wade, 75 Fed. 261.* As the textwriter says of Section 951 in *24 R. C. L. 812:*

> "Although direct suits cannot be maintained against the United States, nor against its property, yet, when the United States institutes a suit, it waives its exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and it is held that the right of set-off is implied by the act of March 3, 1797 (now Section 951, R. S.), which provides * * *."

It would be a strained construction indeed which would read into Section 951 an intention to limit its obviously general scope to suits brought by the Government in District Courts. The section is clear and concise, and it definitely covers all suits brought by the Government against individuals. *United States v. Skinner & Eddy Corporation, 35 F. (2) 889,* and *Nassau Smelting Works v. United States, 266 U. S. 101,* cited to the point by the Government, are clearly inapplicable. Decision in these cases turned upon the Tucker Act, which affects the jurisdiction of the Courts of the United States only, and upon the Dent Act, which provided exclusive remedy in the Court of Claims upon certain contracts made prior to the Armistice under authority of the Secretary of War and the President.

THIRD: The remaining objection of the Government to this set-off attacks the merit thereof. The contention

of counsel in this regard is best exhibited by the following quotations from their brief:

"The Court will note that the provisions in Article II do not constitute a contract of indemnity. The Fleet Corporation (acting on behalf of the United States) does not agree to save decedent McLouth harmless for all of his commitments. The only promise is a qualified one. The promise is to 'adjust and pay such of said contracts and commitments as shall, in the judgment of the owner, be proper under the contract.' This promise is further qualified by the limitation that the commitments to be paid are those 'which a proper audit by the owner shall show to have been properly incurred for the performance of the work under the contract, and which did not exceed the requirements of the contract.'

"When the *Ingram-Day case* was considered on certiorari *(275 U. S. 471)* the Supreme Court said (page 473):

> 'The statute authorized the cancellation of the Government's own contracts, made after its enactment, and just compensation for such cancellation does not include anticipated profits, ordinarily recoverable in an action of assumpsit. *Duesenberg Motors Corp. v. United States, 260 U. S. 115; Russell Motor Company v. United States, 261 U. S. 514.*'

"It was unfortunate that the findings of fact of the District Court did not disclose that the Ingram-Day commitment was canceled because of the cancellation of McLouth's contract by the Fleet Corporation (if such was the fact) because the Supreme Court held (page 474) that on the record and the evidence the rights of the Ingram-Day Lumber Company 'were not dependent on the continued existence of the other' (contract).

"In the face of this conclusive determination of the facts by the Supreme Court, it canont be logically or successfully contended that the Ingram-Day commitment was one which the Government

should pay, as a part of just compensation. The fact being established that the Ingram-Day Lumber Company loss (exclusive of profits) was only $647.65, that amount is the limit decedent or his estate could have collected from the Government, under any circumstances."

The trouble with counsel's argument is that it lacks factual support. The various contracts between the parties completely overcome any thought that the Fleet Corporation, in its dealings with the decedent, clothed itself with the immunities and privileges of the sovereign, or that there was to be restriction of any kind on its undertakings. See *Harwood v. Fleet Corporation, supra*. Likewise, the contention that the Fleet Corporation's promise contained in Article II of the settlement contract was a "qualified one" overlooks subsequent correspondence between the parties. By its letter of August 9, 1920, addressed to the decedent, the Fleet Corporation expressly identified the claim exhibited by this set-off as one which it was to assume, adjust and settle in pursuance of said Article II. The undertaking of the Fleet Corporation as set forth in said Article II, linked by reference with the letter and enclosure of August 9, 1920, completed a contractual obligation of the Fleet Corporation to pay the Ingram-Day commitment. These facts, which are not disputed, are sufficient to render the Fleet Corporation liable to the decedent's representatives upon a showing of nonpayment or adjustment.

The cause of action supporting this claim of set-off is not presented as, and could not be, a direct claim against the Government. It is not presented as, and could not be, a claim for "just compensation." It is a claim for damages based upon breach of contract by a private corporation, and it is presented as a set-off against an original indebtedness to that same corporation which is

now held by an assignee. As a result of the Fleet Corporation's breach of its undertaking to "adjust and pay" the commitment, the decedent was sued thereon by Ingram-Day Lumber Company, which ultimately recovered judgment against his estate in the sum of $42,789.96 *(see Ingram-Day Lumber Company v. McLouth, 275 U. S. 474)*, and his estate has become fettered with a claim in favor of Ingram-Day Lumber Company, duly allowed on October 13, 1932, in the sum of $58,089.04.

In my opinion, the Fleet Corporation rendered itself liable to the decedent and his representatives for payment of the decedent's said commitment and, having failed to pay or adjust same, that a completed cause of action arose against it to the extent fixed by the letter and enclosure of August 9, 1920. Justice and equity, as well as applicable legal principles, require that such cause of action against the Fleet Corporation be set off against the original claim of that same corporation.

Judgment will be entered on the date hereof reversing the order of the Probate Court and remanding the case to that court with direction to disallow the instant claim in full. The usual twenty-day stay of proceedings, pending appeal, is granted.

FRED W. GEORGE,
Circuit Judge.

Dated: February 8, 1937.

SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1939.

The United States of America, Petitioner, *vs.* John C. Shaw, Administrator *De Bonis Non* of the Estate of Sydney C. McLouth, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Michigan.

[March 25, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

In 1918 Sydney C. McLouth contracted to construct nine tugs for the United States Shipping Board Emergency Fleet Corporation. On May 24, 1920, the contract was cancelled and the parties entered into a settlement agreement providing that McLouth was to keep as bailee certain materials furnished him for use in building the tugs and that the Fleet Corporation was to assume certain of McLouth's subcontracts and commitments. Among the commitments assumed was a contract of McLouth's to purchase lumber from the Ingram-Day Lumber Company. The Lumber Company obtained a judgment against McLouth for $42,789.96 for breach of this contract,[1] and, McLouth having died in 1923, filed its claim on the judgment in the probate court of St. Clair County, Michigan. Subsequently the United States obtained a judgment of $40,165.48 against McLouth's administrator,[2] representing damages for the conversion of the materials left with McLouth as bailee, and claim on this judgment was filed in the probate court. The administrator, respondent here, having presented without success the Lumber Company's judgment to the General Accounting Office,[3] sought to set

[1] Ingram-Day Co. v. McLouth, 275 U. S. 471.

[2] Shaw v. United States, 75 F. (2d) 175.

[3] The Act of March 3, 1797, 1 Stat. 512, 514, as amended, 28 U. S. C. § 774 provides that in "suits brought by the United States against individuals, no claim for a credit shall be admitted . . . except such as appear to have been presented to the General Accounting Office for its examination, and to have been by it disallowed. . . ."

off that judgment against the judgment of the United States. The probate court allowed the claim of the United States and denied the set-off, but its ruling as to the set-off was reversed on appeal to the Michigan Supreme Court.[4] The administrator then petitioned the probate court to grant statutory judgment of the balance due the estate. The court found that the claim of the United States, with interest, amounted to $49,442.41 and the Lumber Company's claim to $73,071.38 and "ordered, adjudged and ascertained" that the United States was indebted to the estate for the difference, $23,628.97, "and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America." The probate court's judgment was affirmed on appeal.[5]

On this certiorari we are concerned with the question whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to a binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself.

Because of different views of other federal courts as to the decisions of this Court in the important federal field of cross-claims against the United States,[6] we granted certiorari.[7] *United States* v. *United States Fidelity and Guaranty Company*[8] involves this question.

The statute of Michigan under which this ascertainment of indebtedness was made, so far as pertinent, is set out in the footnote.[9]

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[4] In re McLouth's Estate, 281 Mich. 191.

[5] 290 Mich. 311.

[6] Cf. United States *v.* Eckford, 6 Wall. 484; The Thekla, 266 U. S. 328; In re Patterson-MacDonald Shipbuilding Co., 293 Fed. 192 (C. C. A. 9), certiorari denied, *sub nom.* McLean *v.* Australia, 264 U. S. 582. Roumania v. Guaranty Trust Co., 250 Fed. 341 (C. C. A. 2), certiorari denied, 246 U. S. 663; United States *v.* Nipissing Mines Co., 206 Fed. 431, 434 (C. C. A. 2); Adams *v.* United States, 3 Ct. Cls. 312, 333; Peterson *v.* United States, 26 Ct. Cls. 93, 98. United States *v.* National City Bank, 83 Fed. (2d) 256 (C. C. A. 2), certiorari denied, 299 U. S. 563; American Propellor Co. v. United States, 300 U. S. 475; Guaranty Trust Co. *v.* United States, 304 U. S. 126.

[7] January 8, 1940.

[8] No. 589, this term, decided today.

[9] Compiled Laws of Michigan (1929), c. 266, sec. 15682:

"Set-offs in settlement of claims. Sec. 9. When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise."

There is no contention on the part of respondent that the judgment is enforceable against the United States even in the limited sense of statutory direction to report the judgment to Congress as in the Court of Claims Act[10] or the Merchant Marine Act.[11] Execution against property of governmental agencies subjected to such procedure by statute is sometimes allowed.[12] The position taken is that the probate court judgment is a "final determination" of the rights of the litigants, howsoever such rights may later become important. We are not here concerned with the manner of collection. Such was the holding of the Supreme Court of Michigan.[13]

The state procedure for the determination of the balance against or in favor of an estate, which was employed here, was the recognized method of closing an estate at the time of the probate judgment. The probate judge was empowered to act as commissioner under the statute quoted above.[14] His decision unreviewed was considered final.[15] The determination of the probate court between private parties was enforceable without reexamination in the circuit court.[16] Even the right to execution is not essential to a complete judicial process.[17] The order entered was a final determination of the amounts due the estate by the United States on this claim and cross-claim if the probate court had jurisdiction to render the order against the petitioner.

Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States.[18] No officer by his action can confer jurisdiction.[19] Even when suits

[10] 31 U. S. C. § 226.

[11] 46 U. S. C. § 1113.

[12] F. H. A. *v.* Burr, No. 354, this term, decided February 12, 1940.

[13] Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[14] 290 Mich. 311.

[14] 3 Comp. Laws Mich. (1929), sec. 15681.

[15] Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[16] Shurbun *v.* Hooper, 40 Mich. 503.

[17] Nashville, C. & St. L. Ry. *v.* Wallace, 288 U. S. 249, 263; Flynn *v.* Lorimer's Estate, 141 Mich. 707.

[18] Kansas *v.* United States, 204 U. S. 331; United States *v.* Thompson, 98 U. S. 486, 489, 490; Buchanan *v.* Alexander, 4 How. 20.

[19] Stanley *v.* Schwalby, 162 U. S. 255, 270; Carr *v.* United States, 98 U. S. 433, 437.

are authorized they must be brought only in designated courts.[20] The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. By the act of March 3, 1797, and its successor legislation, as interpreted by this Court, cross-claims are allowed to the amount of the government's claim, where the government voluntarily sues.[21] Specially designated claims against the United States may be sued upon in the Court of Claims or the district courts under the Tucker Act.[22] Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed.[23] As to these matters no controversy exists.

Respondent contends this immunity extends, however, only to original suits; that when a sovereign voluntarily seeks the aid of the courts for collection of its indebtedness it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court. The principle of a single adjudication is stressed, as is the necessity for a complete examination into the cross-claim, despite attendant dislocation of government business by the appearance of important officers at distant points and the production of documents as evidence, to justify the allowance of an offset to the government's claim.[24] It is pointed out that surprise is not involved as no cross-claim may be proven until after submission to and refusal by the government accounting officers.[25] Respondent further insists that his position is supported by *The Thekla*[26] and subsequent de-

[20] Minnesota v. United States, 305 U. S. 382, 388.

[21] 1 Stat. 512, 514; R. S. § 951; 28 U. S. C. § 774. United States v. Wilkins, 6 Wheat. 135, 144.

[22] 28 U. S. C. §§ 41(20), 250.

[23] Keifer & Keifer v. R. F. C., 306 U. S. 381; F. H. A. v. Burr, *supra*.

[24] United States v. Wilkins, *supra*.

[25] 28 U. S. C. § 774.

[26] 266 U. S. 328.

cisions quoting its language.[27] Emphasis is placed upon the fact that these probate proceedings are in rem or quasi in rem[28] as were the libels in admiralty in *The Thekla*.

It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.

The Thekla turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability.[29] In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages. In *The Thekla* opinion the cases of *Illinois Central Railroad Company* v. *Public Utilities Commission*[30] and *Nassau Smelting Works* v. *United States*[31] were cited in support of the statement that " . . . generally speaking a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim." This Court then said: "We do not qualify the foregoing decisions in any way." In the *Smelting* case this Court had said, two weeks before, on a certificate as to the jurisdiction of the district court to consider a counterclaim:

"The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. Nor is there doubt that the question is one which involves the jurisdiction of the District

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[27] See note 33, *infra*.

[28] United States v. Bank of New York Co., 296 U. S. 463, 477; Montgomery v. Wayne Circuit Judge, 284 Mich. 430.

[29] Bowker v. United States, 186 U. S. 135, 139.

[30] 245 U. S. 493, 504, 505.

[31] 266 U. S. 101.

Court as a federal court under the statutes of the United States, for the jurisdiction of the District Court in this regard is wholly dependent on such statutes."[32]

There is little indication in the facts or language of *The Thekla* to indicate an intention to permit generally unlimited cross-claims. Quotations from *The Thekla* in later opinions of this Court are used to illustrate problems entirely apart from the one under consideration here.[33]

The suggestion that the order of the probate court is in reality not a judgment but only a "judicial ascertainment" of credits does not affect our conclusion. No judgment against the United States is more than that. But such an entry, if within the competence of the court passing the order would be res judicata of the issue of indebtedness.[34] The suggestion springs from the opinion in *United States* v. *Eckford*.[35] These words there appear:

"Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States*, (5 Wallace 432) decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount."

The Court had just written that no action could be sustained against the government without consent and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit.[36] The language quoted above means no more than that no judgment may be entered against the government even though the court has ascertained through its processes that the government is actually indebted to the defendants. The judgment should be limited to a dismissal of the government's claim.

In the *Eckford* case this Court was dealing with the litigation at a more advanced stage than the present litigation has reached. The

[32] *Id.*, 106.

[33] American Propellor Co. v. United States, 300 U. S. 475, 478; Guaranty Trust Co. v. United States, 304 U. S 126, 134.

[34] Williams v. United States, 289 U. S. 553, 564.

[35] 6 Wall. 484, 491.

[36] Cf. Reeside v. Walker, 11 How. 272, 290.

United States had sued Eckford's executors on his bond in the District Court for the Southern District of New York. They pleaded a set-off, a balance was found in their favor and a judgment entered that the executors were entitled to be paid the amount found. Suit in the Court of Claims was instituted by the executors, the record was proven, over objection, and judgment entered accordingly. Consequently a reversal of the Court of Claims was the only step necessary. This Court did not deal with the New York judgment.[37]

We have considered respondent's further argument that sovereign immunity was waived when the United States took possession of the assets of its agent the Fleet Corporation prior to the institution of this action and later, but prior to the entry of the probate judgment appealed from, assumed the Corporation's obligations by the act of June 29, 1936.[38] We see nothing in these transactions which indicates an intention to waive the immunity of the United States in the state courts.

Reversed.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[37] Cf. Schaumburg *v.* United States, 103 U. S. 667.

[38] 49 Stat. 1987:

"SEC. 203. The United States Shipping Board Merchant Fleet Corporation shall cease to exist and shall stand dissolved. All the records, books, papers, and corporate property of said dissolved corporation shall be taken over by the Commission. All existing contractual obligations of the dissolved corporation shall be assumed by the United States. Any suit against the dissolved corporation pending in any court of the United States shall be defended by the Commission upon behalf of the United States, under the supervision of the Attorney General, and any judgment obtained against the dissolved corporation in any such pending suit shall be reported to Congress in the manner provided in section 226, title 31, United States Code, for reporting judgments against the United States in the Court of Claims."